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4 UNITED STATES DISTRICT COURT
5 WESTERN DISTRICT OF WASHINGTON
6 AT TACOMA

7 CECIL DUDGEON,

8 Plaintiff,

9 v.

10 KELLY CUNNINGHAM, CAREY
11 STURGEON, MELISSA SOHLSTROM,
12 and JOSEPH MITROVICH,

13 Defendants.

No. C10-5372 RBL/KLS

REPORT AND RECOMMENDATION

Noted for: September 2, 2011

14 Plaintiff Cecil Dudgeon is civilly committed as a sexually violent predator to the Special
15 Commitment Center (SCC) pursuant to Wash. Rev. Code 71.09. Mr. Dudgeon claims that
16 Defendants Kelly Cunningham, Carey Sturgeon, Melissa Sohlstrom, and Joseph Mitrovitch
17 (collectively "SCC Defendants") violated his civil rights when they denied him access to a
18 calendar containing family photographs. ECF No. 1. He seeks a permanent injunction enjoining
19 the SCC Defendants from interfering or depriving him of full access to his mail. *Id.*, p. 13. On
20 May 25, 2010, Mr. Dudgeon filed a motion for preliminary injunction asking this Court for an
21 Order enjoining Defendants "from further unwarranted censoring of Plaintiff's incoming mail,
22 including family photographs." ECF No. 2. The Court denied the motion. ECF No. 21. That
23 decision was affirmed by the Ninth Circuit Court of Appeals affirmed the denial. ECF No. 44.

24 Presently before the Court is Defendants' Motion for Summary Judgment. ECF No. 46.
25 In response, Plaintiff has filed a "Certification of Objections." ECF No. 47. Defendants have
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1 replied. ECF No. 48. Having carefully reviewed the motion, briefs in opposition, and summary
2 judgment evidence, the Court recommends that the motion for summary judgment be granted.

3 **STATEMENT OF FACTS**

4 On February 2, 2010, Mr. Dudgeon received an “8 ½ by 11-inch booklet style calendar
5 prepared and sent to him by a member of his immediate family.” ECF No. 1, p. 5. The booklet
6 contained a calendar for each month of the year 2010, with a collage of computer generated
7 photographs of family members on the facing pages. *Id.* Mr. Dudgeon’s daughter states that she
8 created family calendars for the past few years and that the photographs in the calendars showed
9 Mr. Dudgeon’s family members engaged in “normal mundane family activities engaged in by
10 typical conservative American families, e.g., dinners, picnics, family get-togethers, birthday
11 observances, etc.” ECF No. 47, p. 25 (Attachment 1 - Declaration of Dawn Kaufman). Ms.
12 Kaufman states that none of the photographs contained anything sexually explicit or violent. *Id.*
13 On April 13, 2008, Ms. Kaufman mailed to Mr. Dudgeon a copy of the 2008 family calendar.
14 Mr. Dudgeon received the calendar without incident and told her that it lifted his morale to
15 maintain visual contact with his children, grandchildren and great grandchild. *Id.*, p. 25. On
16 January 7, 2009, Ms. Kaufman mailed to Mr. Dudgeon a copy of the 2009 calendar and received
17 a similar acknowledgement from Mr. Dudgeon. *Id.*, p. 26.

18 On January 24, 2010, Ms. Kaufman mailed to Mr. Dudgeon a copy of the 2010 family
19 calendar. She states that the 2010 calendar is the “exact same type as the ones mailed to Plaintiff
20 in years past. It featured the same family members engaged in essentially the same activities and
21 in the same general dress and scenes.” ECF No. 47 (Kaufman Decl.), p. 26. This time however,
22 she received a telephone call from Mr. Dudgeon stating that he had been refused permission to
23 possess the calendar. *Id.*

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REPORT AND RECOMMENDATION- 2

1 **B. SCC Mail Policies 202 and 208**

2 Dr. Carey Sturgeon, SCC's Clinical Director, states that it is SCC policy to review
3 photographs that come into SCC to ensure they are not detrimental to the treatment environment.
4 Pursuant to SCC Policy 208, Sexually Explicit, Violent and Related Material, SCC prohibits
5 residents from possessing or viewing representations of persons identified as being in an
6 individual resident's victim range/profile(s) and images of past victims. ECF No. 13
7 (Declaration of Carey Sturgeon), ¶¶ 1-3. SCC mail room staff inspect all incoming mail and
8 packages to ensure they comply with all SCC policies. Pursuant to SCC Policy 202, Resident
9 Postage, Packages, Mail and Internal Distribution, mail room staff scan the mail in the presence
10 of the resident and conduct a cursory review for the purposes of ascertaining if the content is
11 unauthorized or contraband. The act of scanning personal mail consists of a staff member
12 flipping through the pages, spending no longer than 15 seconds per page. ECF No. 14
13 (Declaration of Cathi D. Harris), ¶¶ 1-4.
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16 If the mail in question contains photographs, mail room staff will hold the item to allow
17 the Clinical Director or the Psychology Associate for the resident's unit to decide whether the
18 item is appropriate for the resident to possess. SCC's mail policy is designed to prohibit
19 contraband and counter-therapeutic material from entering the institution. ECF No. 14 (Harris
20 Decl.), ¶¶ 5-6.
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22 Mr. Dudgeon contends that it is "virtually impossible for contraband to be introduced into
23 the SCC by way of mail to a resident" and the only way to introduce such contraband would be
24 through the cooperation of an SCC staff member. ECF No. 47, p. 4. According to Cathi Harris,
25 SCC's Associate Superintendent, SCC historically has had problems with contraband images
26 being introduced into the institution. The Inspection of Care Committee (an independent outside

1 monitoring body for SCC) has identified the availability of contraband in SCC as a problem the
2 program must address. SCC's mail search policy is an integral part of the plan to inhibit the
3 introduction of contraband. ECF No. 14 (Harris Decl.), ¶¶ 7-8. Scanning the mail deters the
4 introduction of contraband onto the living units and is required to ensure the safety of staff and
5 residents. In circumstances where material may be counter-therapeutic, the SCC applies a
6 conservative standard knowing that any material allowed within the confines of the facility might
7 be spread to others. There is no ready alternative to scanning the mail to ensure people do not
8 send contraband and counter-therapeutic material into the facility. *Id.* at ¶¶ 9-11.

10 SCC clinical staff determined, in their professional judgment, that it is counter-
11 therapeutic for sexually violent predators in a total confinement facility to possess pictures or
12 media that depict their victim range or profile because these materials may be used for
13 masturbation purposes and reinforce their deviant sexual interests. This is especially problematic
14 for residents who are not addressing and attempting to manage their deviant sexual interests by
15 participating in treatment. ECF No. 13 (Sturgeon Decl.) at ¶ 4. Throughout his confinement at
16 the SCC, Mr. Dudgeon has refused to be part of any treatment program. ECF No. 47, p. 4.

18 Melissa Green is Mr. Dudgeon's Program Area Manager. ECF No. 11 (Declaration of
19 Melissa Green), ¶ 1. She manages the residential care and clinical treatment for the residents
20 living in area 3; supervises and evaluates subordinate staff; consults with other key SCC
21 managers including the Clinical Director, Residential Services Manager, Health Services
22 Administrator, and the Facilities and Support Services Administrator; works directly with male
23 and female residents, including individuals with personality disorders, major mental illnesses,
24 and developmental delays; and, assesses and manages emergency situations. *Id.* As part of her
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1 duties, she frequently consults with Psychology Associate Joseph Mitrovitch to review photos
2 received by residents in the mail. *Id.*, ¶ 4.

3 **C. Decision to Deny 2010 Calendar**

4 The decision to not allow Mr. Dudgeon to keep the calendar was a treatment decision.
5 Ms. Green met with Psychology Associate Joseph Mitrovitch and considered Mr. Dudgeon's
6 offense history to determine whether it was appropriate for Mr. Dudgeon to possess the calendar.
7 Specifically, Ms. Green reviewed Mr. Dudgeon's New Admission Profile. ECF No. 11 (Green
8 Decl.), ¶¶ 3-5. A New Admission Profile (NAP) is a document put together by a clinical staff
9 member (i.e., a psychologist or psychology associate) when a resident is initially transferred to
10 the SCC. The NAP contains basic information about a new resident such as their date of birth
11 and county where the State filed the civil commitment petition. It also includes a short narrative
12 of the resident's sex offender history, prior diagnoses, and any prior treatment. ECF No. 13
13 (Sturgeon Decl.), ¶ 5.

14 Mr. Dudgeon's NAP indicates that Mr. Dudgeon began molesting a girl who would
15 become his stepdaughter, when she was 8 years old, that the abuse continued for 14 years, and
16 that Mr. Dudgeon was subsequently charged and sent to prison for this offense. The NAP also
17 indicates that Mr. Dudgeon raped a 14 year-old girl who was a family friend and that he was also
18 convicted and sentenced to jail for this offense. ECF No. 11 (Decl. of Green), ¶¶ 6-7.

19 According to Mr. Dudgeon, the NAP contains "false, uncharged, unsubstantiated
20 allegations." He states that he has never been charged or convicted of any offense of any nature
21 with anyone under the age of 14 or over 24 years of age. ECF No. 47, p. 11. In support, he
22 provides an affidavit of his stepdaughter and his wife, stating that Mr. Dudgeon did not meet his
23 wife until 1983, just before his wife's youngest daughter turned 10 years old. ECF No. 47, pp.
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1 28-29 (Attachment 2 - Declaration of Christine Spivey and M. Claudine Dudgeon). According
2 to the Washington Court of Appeals, Mr. Dudgeon started living together with the victim (M.S.)
3 and the victim's mother in 1987, and that he sexually assaulted M.S. on December 30, 1997.
4 *State v. Dudgeon*, No. 27986-0-II, 115 Wash.App. 1001, Not Reported in P.3d, 2003 WL 116180
5 (Wash. App. Div. 2 January 10, 2003) (unpublished).

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7 Second, Mr. Dudgeon claims that the prison term referred to in the NAP is incorrectly
8 linked to the molestation charge of his stepdaughter, instead of the indecent liberties charge that
9 occurred on or about December 30, 1997, with a 24 year old female. In support, Mr. Dudgeon
10 attaches a copy of a Judgment and Sentence reflecting that he was found guilty on July 24, 2001
11 of two counts of indecent liberties with forcible compulsion, which occurred on or about
12 December 30, 1997. ECF No. 47, p. 30 (Attach 3). This date coincides with the third degree
13 rape and indecent liberties charge relating to Mr. Dudgeon's step-daughter, M.S., referred to
14 above. Washington state court records reflect that the State charged Mr. Dudgeon with third
15 degree rape and indecent liberties with forcible compulsion on May 21, 1999 for the sexual
16 assault and rape of his step-daughter, M.S., on December 30, 1997. The jury convicted Mr.
17 Dudgeon of indecent liberties, but it did not reach a verdict on the rape charge. *Id.*, see also Case
18 No. 09-5299 FDB/KLS (ECF No. 12, Exh. 7, p. 2). That conviction was confirmed. *State v.*
19 *Dudgeon*, No. 27986-0-II, 115 Wash.App. 1001, Not Reported in P.3d, 2003 WL 116180 (Wash.
20 App. Div. 2 January 10, 2003) (unpublished).

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23 In July 2008, the Washington State Appellate Court held that the jury heard sufficient
24 evidence (including testimony from six of his alleged victims that he raped and molested on
25 hundreds of occasions from the early 1970s through the late 1990s) to reach its conclusion that
26 Mr. Dudgeon was incarcerated for a sexually violent offense and was likely to reoffend in a

1 predatory manner. *State v. Dudgeon*, 146 Wash.App. 216, 189 P.3d 240 (Wash.App. Div. 2, July
2 29, 2008).

3 Third, Mr. Dudgeon states that the NAP falsely states that Mr. Dudgeon raped a 14 year
4 old when the intercourse was actually consensual. ECF No. 47, p. 3. He attaches Page 3 from a
5 document entitled “Sex Offender PSI – Dudgeon, Cecil,” reflecting three convictions for
6 “Unlawful Intercourse,” from July 1, 1983 through January 7, 1984.” ECF No. 47, p. 31
7 (Attachment 4).
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9 **D. Denial of 2010 Calendar**

10 The calendar contained photos of (1) two young girls, approximately 7 or 8 years of age,
11 dressed in what Ms. Green would describe as “Easter Sunday” type dresses; (2) a number of
12 teenage girls sitting at a table in a restaurant; and, (3) two young college aged women outside.
13 Based on Mr. Dudgeon’s offense history and her consultation with Mr. Mitrovitch, it was Ms.
14 Green’s professional judgment that the photos violated SCC policy because they were
15 representations of persons identified as being in Mr. Dudgeon’s victim range and profile. It was
16 her professional judgment that the photos were inappropriate and counter-therapeutic for Mr.
17 Dudgeon to possess. ECF No. 11 (Decl. of Green), ¶¶ 8-9.
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19 Joseph Mitrovich, is a Psychology Associate at the SCC. He serves as a program area
20 specialist in sex offender treatment, which includes facilitating treatment team meetings,
21 providing guidance in treatment plan development and intervention, and reviewing the
22 appropriateness of media requests. He also facilitates sex offender specific treatment groups and
23 provides individual case management. ECF No. 12 (Declaration of Joseph Mitrovich), ¶ 1.
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25 Mr. Mitrovich states that the decision to deny the calendar to Mr. Dudgeon was a
26 treatment decision based on his meeting with Melissa Green, his review of Mr. Dudgeon’s

1 offense history, most recent Annual Review (AR), and review of the photographs. ECF No. 12
2 (Mitrovich Decl.), pp. 2-7. The AR is a document generated on an annual basis by a
3 psychologist from SCC's Forensic Services Unit, and contains among other things, the resident's
4 diagnosis, a discussion on their progress in treatment if applicable, their behavior at the
5 institution over the past year, and an opinion as to whether the resident still meets the statutory
6 criteria as an Sexually Violent Predator (SVP). ECF No. 13 (Decl. of Sturgeon), ¶ 6.

8 Although he does not remember specific photographs, he does remember that the
9 calendar contained one or more pictures of young girls fitting Mr. Dudgeon's victim profile.
10 ECF No. 12 (Decl. of Mitrovich), ¶ 8. It is Mr. Mitrovich's professional opinion that the photos
11 violated SCC policy because they were representations of persons identified as being in Mr.
12 Dudgeon's victim range and profile and that the photos were inappropriate and counter-
13 therapeutic for Mr. Dudgeon to possess. *Id.*, ¶ 9. Mr. Mitrovich was also concerned about Mr.
14 Dudgeon possessing the calendar because Mr. Dudgeon does not participate in sex-offender
15 treatment and therefore, Mr. Mitrovich did not know if the photos would be triggers for Mr.
16 Dudgeon or how he would use them. *Id.*

18 Mr. Dudgeon states that he has received similar photographic images of his family in the
19 past, possession of these photographs have caused no safety issues, security breaches, or
20 "triggers" to precipitate counter-therapeutic behavior or incidents. He has also not passed the
21 family photos around to any other resident. ECF No. 47, p. 6.

23 In Ms. Harris' professional judgment, SCC needs to scan incoming mail to ensure the
24 security of the SCC. Scanning the mail deters the introduction of contraband onto the living
25 units and is required to ensure the safety of staff and residents. In circumstances where material
26 may be counter-therapeutic, SCC applies a conservative standard knowing that any material

1 allowed within the confines of the facility might be spread to others. There is no ready
2 alternative to scanning the mail to ensure people do not send contraband and counter-therapeutic
3 material into the facility. ECF No. 14 (Harris Decl.), ¶¶ 9-11.

4 SCC has a resident grievance procedure which allows residents to appeal decisions if
5 they think SCC erroneously applied a policy. Mr. Dudgeon could have filed a grievance arguing
6 Ms. Green and Mr. Mitrovitch erroneously applied the policy and he should be allowed to have
7 the calendar. ECF No. 14 (Harris Decl.), ¶¶ 12-13. Mr. Dudgeon maintains that he did grieve
8 by “making concerted efforts to resolve the issue administratively at the senior administrative
9 levels within the Washington State Special Commitment Center (SCC), the Department of Social
10 and Health Services (DSHS), and the Department of Health.” ECF No. 47, p. 2 (citing
11 attachments to ECF No. 2).

13 Kelly Cunningham, Superintendent of SCC, encouraged Mr. Dudgeon to speak with his
14 Residential Program Manager and the Program Psychology Associate to discuss which types of
15 family pictures could be approved so that his family could design a calendar collage of
16 acceptable family pictures. ECF Nos. 10-3, 10-4, 10-5.

18 **STANDARD OF REVIEW**

19 The court shall grant summary judgment if the movant shows that there is no genuine
20 dispute as to any material fact, and the movant is entitled to judgment as a matter of law. Fed. R.
21 Civ. P. 56(a). The moving party has the initial burden of production to demonstrate the absence
22 of any genuine issue of material fact. *Playboy Enterprises, Inc. v. Netscape Communications*
23 *Corp.*, 354 F.3d 1020, 1023-24 (9th Cir. 2004). A nonmoving party’s failure to comply with
24 local rules in opposing a motion for summary judgment does not relieve the moving party of its
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1 affirmative duty to demonstrate entitlement to judgment as a matter of law. *Martinez v.*
2 *Stanford*, 323 F.3d 1178, 1182-83 (9th Cir. 2003).

3 “If the moving party shows the absence of a genuine issue of material fact, the non-
4 moving party must go beyond the pleadings and ‘set forth specific facts’ that show a genuine
5 issue for trial.” *Leisek v. Brightwood Corp.*, 278 F.3d 895, 898 (9th Cir. 2002) (citing *Celotex*
6 *Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986)). The non-
7 moving party may not rely upon mere allegations or denials in the pleadings but must set forth
8 specific facts showing that there exists a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*,
9 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986). A plaintiff must “produce at least
10 some significant probative evidence tending to support” the allegations in the complaint. *Smolen*
11 *v. Deloitte, Haskins & Sells*, 921 F.2d 959, 963 (9th Cir. 1990). A court “need not examine the
12 entire file for evidence establishing a genuine issue of fact, where the evidence is not set forth in
13 the opposing papers with adequate references so that it could conveniently be found.” *Carmen v.*
14 *San Francisco Unified School District*, 237 F.3d 1026, 1031 (9th Cir. 2001). This is true even
15 when a party appears *pro se*. *Bias v. Moynihan*, 508 F.3d 1212, 1219 (9th Cir. 2007).

16 Where the nonmoving party is *pro se*, a court must consider as evidence in opposition to
17 summary judgment all contentions “offered in motions and pleadings, where such contentions
18 are based on personal knowledge and set forth facts that would be admissible in evidence, and
19 where [the party appearing *pro se*] attested under penalty of perjury that the contents of the
20 motions or pleadings are true and correct.” *Jones v. Blanas*, 393 F.3d 918, 923 (9th Cir. 2004)
21 (citation omitted), *cert. denied*, 546 U.S. 820, 126 S. Ct. 351, 163 L.Ed.2d 61 (2005).
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DISCUSSION

Mr. Dudgeon does not dispute Defendants’ “legitimate right to screen incoming resident mail,” including his own mail. ECF No. 47, p. 8. Rather, he claims that he has a well-established First Amendment right to receive his family calendar as he has been permitted to do in the past, without “unwarranted governmental interference.” *Id.* Mr. Dudgeon argues that he should not be denied the 2010 family calendar – or any future family calendars – merely because different SCC staff made speculative assumptions. *Id.* Mr. Dudgeon also argues that the refusal to allow him to possess the 2010 calendar was based on false allegations contained in his criminal record. To the extent Mr. Dudgeon is asserting that he did not commit the crimes for which he was convicted and/or committed to the SCC, such a claim is more properly reserved for a petition for writ of habeas corpus and will not be addressed here. *See, Preiser v. Rodriguez*, 411 U.S. 475, 489-90 (1973) (When a person confined by the state is challenging the very fact or duration of his physical confinement and the relief he seeks will determine whether he is or was entitled to immediate or speedier release from confinement, his sole remedy is a writ of habeas corpus.)

Mr. Dudgeon’s denial of his criminal history is not relevant to whether Defendants exercised professional judgment in relying on that history to identify Mr. Dudgeon’s victim profile. Even if the Court assumes that Mr. Dudgeon’s victims were limited to young women aged 14 to 24 (*see* ECF No. 47, p. 11), the issue here is whether the Defendants violated his First Amendment rights in denying him access to the 2010 calendar that featured young girls and women within his victim range/profile. In *Turner v. Safley*, the Supreme Court set forth the test for evaluating restrictions on the First Amendment rights of prisoners. Although Mr. Dudgeon is

1 not a prisoner, cases involving prisoner's rights are instructive as applied to civilly detained
2 persons.

3 **A. The *Turner* Factors**

4 When reviewing a detention facility's restrictions of constitutional rights that are
5 inconsistent with incarceration, the Supreme Court directs courts to consider whether the
6 challenged restriction was "reasonably related to legitimate penological interests." *Turner v.*
7 *Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987). The *Turner* Court provided
8 four factors to guide reviewing courts in applying this test: (1) the existence of a valid, rational
9 connection between the prison regulation and the legitimate governmental interest put forward to
10 justify it; (2) the existence of alternative means of exercising the right that remain open to prison
11 inmates; (3) the impact that accommodation of the asserted constitutional right will have on
12 guards and other inmates, and on the allocation of prison resources generally; and (4) the absence
13 of ready alternatives as evidence of the reasonableness of the regulation (the presence of obvious
14 easy alternatives may evidence the opposite). *Turner*, 107 S.Ct. at 2262.

17 The Ninth Circuit has noted that not all four factors will be relevant to each case; for
18 example, the second *Turner* factor - availability of other avenues for exercising the right
19 infringed upon - is much more meaningful in the first amendment context than the fourth or
20 eighth, where the right is to be free from a particular wrong. *Michenfelder v. Sumner*, 860 F.2d
21 328, 331 n.1 (9th Cir. 1988). On the other hand, the first factor "'looms especially large because
22 it 'tends to encompass the remaining factors, and some of its criteria are apparently necessary
23 conditions.'" *Id.* If a policy fails the first prong, the court need not address the other factors.
24 *Ashker v. California Department of Corrections*, 350 F.3d 917, 923 (9th Cir. 2003). The
25 Supreme Court has made clear that the burden "is not on the State to prove the validity of prison
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1 regulations but on the prisoner to disprove it.” *Overton v. Bazzetta*, 539 U.S. 126, 132, 123 S.
2 Ct. 2162, 156 L. Ed. 2d 162 (2003), *petition for rehearing denied*, 539 U.S. 982, 124 S. Ct. 35,
3 156 L. Ed. 2d 693 (2003).

4 In considering these factors, the court should defer to “the informed discretion of
5 corrections officials.” *Id.* at 90, 107 S. Ct. 2254. *Bull v. City and County of San Francisco*, 595
6 F.3d 964, 971 (9th Cir. 2010). Evaluation of the penological objectives is committed to the
7 considered judgment of administrators who are actually charged with and trained in the running
8 of the particular institution under examination. *O’Lone*, 482 U.S. at 359. The *Turner* analysis
9 applies equally to facial and “as applied” challenges. *Bahrapour v. Lampert*, 356 F.3d 969,
10 975 (9th Cir. 2004).

11 12 **1. Legitimate Governmental Interest**

13 Under SCC’s mail policy, the contents of all incoming mail and packages are scanned in
14 the presence of the resident. Scanning consists of a staff member flipping through the pages,
15 spending no longer than 15 seconds per page, to determine that the content does not contain
16 contraband. The availability of contraband is a problem within SCC and SCC’s mail search
17 policy is an integral part of the plan to inhibit the further introduction of contraband into the
18 SCC. It is the professional judgment of SCC officials that scanning incoming mail is necessary
19 to ensure the security of the SCC; it deters the introduction of contraband onto the living units;
20 and, is required to ensure the safety of staff and residents. Where material may be counter-
21 therapeutic, it is necessary to apply a conservative approach as any material allowed within SCC
22 can be shared with other residents. ECF No. 14, ¶¶ 4, 6-10.

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25 Courts have determined that ensuring security and order at an institution is a permissible
26 non-punitive objective, whether the facility houses pretrial detainees, convicted inmates, or both.

1 *Bell v. Wolfish*, 441 U.S. 520, 561, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979). “[C]entral to all
2 other corrections goals is the institutional consideration of internal security within the
3 correctional facilities themselves.” *Jones v. North Carolina Prisoners’ Labor Union, Inc.*, 433
4 U.S. 119, 132, 97 S. Ct. 2532, 53 L. Ed. 2d 629 (1977) (citing *Pell v. Procunier*, 417 U.S. 817,
5 823, 94 S. Ct. 2800, 41 L. Ed. 2d 495 (1974)). “A detention facility is a unique place fraught
6 with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all
7 too common an occurrence.” *Bell*, 441 U.S. at 559.

9 SCC has submitted evidence of a valid, rational connection between its mail scanning
10 policy and its interest in preventing contraband and counter-therapeutic material from entering
11 SCC. As noted above, Mr. Dudgeon does not challenge the constitutionality of SCC’s mail
12 scanning policies or SCC’s right to scan his incoming mail. He argues, however, that there is no
13 valid, rational connection between the denial of the 2010 calendar and SCC’s stated legitimate
14 interests because there is no proof that the photographs contained in the 2010 calendar are any
15 different than those he received in the past without incident. He also claims that SCC officials
16 relied on false information in his criminal history report in determining the age range of his
17 victims and claims that none of the photographs depicted anyone between the ages of 14 and 24.
18 ECF No. 47, p. 2.

20 The district court must draw all justifiable inferences in the prisoner’s favor by
21 distinguishing between evidence of disputed facts and disputed matters of professional judgment.
22 In respect to the latter, the court’s inferences must accord deference to the views of prison
23 authorities. *Beard v. Banks*, 548 U.S. 521, 126 S.Ct. 2572, 2578 (2006) (citing *Overton*, *supra*).
24 Unless a prisoner can point to sufficient evidence showing the policy is not reasonably related to
25 legitimate penological objectives to allow him to prevail on the merits, he cannot prevail at the
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summary judgment stage. *Id.* In this case, the undisputed facts are sufficient to meet Defendants' burden to establish a rational common-sense connection between its mail policies and stated objectives. This Court previously determined that it is self-evident that without a mail scanning policy, people outside the SCC could send contraband, weapons, and counter-therapeutic material through the mails and into the facility. ECF No. 19, p. 10.

Even assuming that Mr. Dudgeon received family photographs in the past and that the 2010 calendar contained photographs of no one between the ages of 14 and 24, Mr. Dudgeon has presented no evidence to rebut the rational connection between SCC's mail policies and preventing contraband or counter-therapeutic materials from entering SCC through the mails. There is nothing to rebut the undisputed evidence that SCC officials have a legitimate non-punitive policy requiring its staff to scan all mail, which would include the 2010 calendar and any subsequent photographic calendars addressed to Mr. Dudgeon. As discussed more fully below, there is also no evidence to rebut the undisputed facts that the decision to withhold the 2010 calendar was not based on the professional judgment of SCC officials. Accordingly, SCC meets the first prong of the *Turner* test.

2. Alternative Means of Exercising the Right

Mr. Dudgeon seeks to exercise his First Amendment right to correspond with his family and continue to receive family photographs as he has done in the past. He argues that the ready alternative means is to simply let him continue to receive future calendars without interference. The argument is specious. The Court will not assume that any calendars and/or photographs that will be sent to Mr. Dudgeon in the future will not contain contraband or counter-therapeutic materials – that determination must be left to the professional judgment of SCC officials. In addition, there is no evidence that SCC's mail policy prevents Mr. Dudgeon from corresponding

1 with his family or bans all family photographs. Instead, the policy bans representations of
2 persons identified as being in an individual resident's victim range or profile.

3 Mr. Dudgeon now argues that SCC has "broadened their scope of oppressive censorship"
4 by withholding a newspaper article depicting a photographic image of his teenage grandson and
5 56 year old niece. ECF No. 47, p. 14. Although SCC initially held the photographs, they were
6 returned to his possession. *Id.* This evidence demonstrates that Mr. Dudgeon is able to
7 correspond and receive family photographs. The evidence also reflects that SCC Superintendent
8 Cunningham encouraged Mr. Dudgeon several times to meet with his program area manager and
9 psychology associate to discuss what types of family photos SCC could approve for Mr.
10 Dudgeon to have in his possession. ECF Nos. 10-3, 10-4, and 10-5. Mr. Dudgeon does not
11 dispute this or provide evidence that he was prohibited from meeting with SCC officials to
12 discuss the types of family photos that are appropriate.
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14 **3. Impact of Accommodation; Allocation of Resources**

15 This Court has previously found it to be self-evident that without a mail scanning policy,
16 people outside the SCC could send contraband, weapons, and counter-therapeutic material
17 through the mails into the facility. ECF No 19, p. 10. The Court has taken judicial notice that
18 the introduction of such material would have a detrimental impact on SCC residents and staff. In
19 particular, counter-therapeutic material can be shared with other residents within the SCC,
20 undermining therapy efforts. As noted below, there is no ready alternative to scanning the mail
21 that will prevent this introduction of contraband, weapons, and counter-therapeutic materials into
22 the SCC.
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1 **4. Absence of Ready Alternatives**

2 SCC’s Associate Superintendent, Cathi D. Harris, states that there is no ready alternative
3 to scanning the mail to ensure people do not send contraband and counter-therapeutic material
4 into the institution. ECF No. 14, ¶ 11. Mr. Dudgeon provides no ready alternatives.
5 Defendants have raised legitimate security concerns – the presence of contraband within SCC
6 and the introduction of contraband through incoming mail. Thus, SCC’s mail policies are
7 reasonably related to SCC’s interest in maintaining security and it is irrelevant whether a
8 particular scan or rejection of a mail item may be deemed to be unconstitutional.
9

10 The *Turner* factors favor the SCC Defendants. Because there is evidence that the
11 decision to not allow Mr. Dudgeon to keep the calendar was a treatment issue, the Court also
12 looks to the deferential professional judgment standard enunciated in *Youngberg v. Romeo*, 457
13 U.S. 307, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982).
14

15 **B. Exercise of Professional Judgment**

16 In *Youngberg*, the Supreme Court first recognized that involuntarily committed persons
17 have a constitutional right to “minimally adequate or reasonable training to ensure safety and
18 freedom from undue restraint.” *Youngberg*, 457 U.S. at 319. The Court cautioned, however,
19 against imposing expansive obligations on the states in their care of such persons as ““the
20 Constitution only requires that the courts make certain that professional judgment in fact was
21 exercised. It is not appropriate for the courts to specify which of several professionally
22 acceptable choices should have been made.”” *Id.* at 321. The *Youngberg* court also explained
23 that interference by the federal judiciary with the internal operations of these institutions should
24 be minimized and that a decision, if made by a professional, is presumptively valid. *Id.*
25 “[L]iability may be imposed only when the decision by the professional is such a substantial
26

1 departure from accepted professional judgment, practice, or standards as to demonstrate that the
2 person responsible actually did not base the decision on such a judgment.” *Id.* at 322-23.

3 Professional judgment can be based on formal education, training, or experience. *Id.*, 323
4 n.30 and Federal Rules of Evidence, Rule 702. The professional judgment standard refers to a
5 decisionmaker who is “a person competent, whether by education, training or experience, to
6 make the particular decision at issue.” *Youngberg*, 457 U.S. at 323, n.30. While long-term
7 treatment decisions normally should be made by persons with degrees in medicine or nursing,
8 “day-to-day decisions regarding care – including decisions that must be made without delay –
9 necessarily will be made in many instances by employees without formal training but who are
10 subject to the supervision of qualified persons.” *Id.*

12 Professional judgment can, therefore be exercised without regard to the person’s
13 possession of a particular degree. Mr. Dudgeon argues that Defendants Green and
14 Mitrovich are not board certified psychologists and are not able to decide what photographs are
15 inappropriate and counter-therapeutic for a resident to possess. ECF No. 47, pp. 16-19. Mr.
16 Mitrovich is a psychology associate at SCC (ECF No. 43 ¶ 1), and Ms. Green is a program area
17 manager (ECF Nos. 47-48 ¶ 1). Mr. Mitrovich has a master’s degree in clinical psychology and
18 is defending his dissertation this summer to receive his doctorate in clinical psychology. ECF
19 No. 12 ¶ 2. Ms. Green has a bachelor’s degree in Music Therapy and a master’s degree in
20 Healthcare Administration. She is a board certified Music Therapist and a certified Geriatric
21 Mental Health Specialist. ECF No. 11 ¶ 2. Their job duties include frequently meeting to
22 consider whether photographs received by residents in the mail are appropriate for the residents
23 to possess. ECF No. 44 ¶ 4.

1 It is SCC policy to review photos that come into the institution to ensure they are not
2 detrimental to the treatment environment. ECF No. 13, ¶ 2. Pursuant to SCC Policy 208,
3 Sexually Explicit, Violent and Related Material, SCC prohibits a resident from possessing or
4 viewing representations of persons identified as being in the resident's victim range/profile(s)
5 and images of past victims. ECF No. 13, ¶ 3. It is the professional judgment of SCC officials
6 that it is counter therapeutic for individuals in a total confinement facility for sexually violent
7 predators to possess pictures or media that depict their victim range or profile because these
8 materials may be used for masturbation purposes and reinforce their deviant sexual interests. *Id.*,
9 ¶ 4. This is especially problematic for residents who are not addressing and attempting to
10 manage their deviant sexual interests by participating in treatment. *Id.*; ECF No. 12, ¶ 9. Mr.
11 Dudgeon refuses to participate in treatment at the SCC. ECF No. 47, p. 4.

12
13 If mail sent to a resident contains photographs, the mail is held to allow the resident's
14 Clinical Director or the Program Area Manager to decide whether the item is appropriate for the
15 resident to possess. ECF No. 14, ¶ 5. In this case, Mr. Dudgeon's Program Area Manager
16 Melissa Green, and Joseph Mitrovitch, the Psychology Associate assigned to Mr. Dudgeon,
17 reviewed the photographs, Mr. Dudgeon's offense history, and Mr. Dudgeon's NAP and AR, to
18 determine whether it was appropriate for Mr. Dudgeon to possess the calendar. ECF Nos. 11 and
19 12.

20
21 According to Ms. Green and Mr. Mitrovich, the calendar included photographs of young
22 girls and young women of ages consistent with the victims identified in Mr. Dudgeon's NAP and
23 AR. ECF No. 11, ¶ 9; ECF No. 12, p. 9. Specifically, Ms. Green recalls photos of two young
24 girls approximately 7 or 8 years old, a number of teenage girls, and college age women. ECF
25 No. 11, ¶ 8. Mr. Dudgeon's daughter, who prepared the calendars, states that the calendars
26

1 contained photographs of Plaintiff's family members, including his children, grandchildren and
2 great grandchild. ECF No. 47, p. 25. The ages of the persons included in photographs are
3 unknown. However, Mr. Dudgeon states that all of the persons depicted in the photographs were
4 under the age of 14 or over the age of 24 and that he was convicted for sexually assaulting a 14
5 year old and a 24 year old (not an 8 year old, as stated in his NAP). ECF No. 47, p. 2. It is
6 undisputed, however, that Ms. Green and Mr. Mitrovitch reviewed the photographs, identified
7 persons within the photographs to include 7 and 8 year olds, as well as teenage and college aged
8 girls. The evidence also reflects that they considered the photographs in light of Mr. Dudgeon's
9 offense history, the NAP, the AR, and Mr. Dudgeon's lack of participation in offender treatment.
10 As to this latter consideration, Mr. Mitrovitch expressed concern that because Mr. Dudgeon does
11 not participate in sex offender treatment, it was, therefore, unknown to them if the photos would
12 be a trigger for Mr. Dudgeon, or how he would use them. ECF No. 12, ¶ 10.
13

14
15 The record reflects that SCC officials exercised their professional judgment in
16 determining that the 2010 calendar was inappropriate and counter-therapeutic for Mr. Dudgeon
17 to possess.

18 CONCLUSION

19 The SCC Defendants have submitted evidence of a valid, rational connection between its
20 mail scanning policy and its interest in preventing contraband and counter-therapeutic material
21 from entering SCC. SCC's mail policy does not prevent Mr. Dudgeon from corresponding with
22 his family or receiving appropriate family photographs. There is no ready alternative to scanning
23 the mail that will prevent the introduction of contraband, weapons, and counter-therapeutic
24 materials into the SCC and the introduction of such material would have a detrimental impact on
25 SCC residents and staff. It is clear from the record that the SCC Defendants exercised
26

1 professional judgment in determining that the 2010 calendar was counter-therapeutic to Mr.
2 Dudgeon. Enjoining SCC from scanning Mr. Dudgeon's mail (even if limited to not scanning
3 future calendars) could allow the introduction of contraband and other counter-therapeutic
4 material into the facility. Mr. Dudgeon's family remains free to send him letters and
5 photographs that do not contain counter-therapeutic images.

6
7 For the foregoing reasons, the undersigned recommends that the Court grant the SCC
8 Defendants' Motion for Summary Judgment (ECF No. 46).

9 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure
10 (Fed.R. Civ. P.), the parties shall have fourteen (14) days from service of this Report to file
11 written objections. See also Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of
12 those objections for purposes of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985). Accommodating
13 the time limit imposed by Rule 72(b), the Clerk is directed to set the matter for consideration on
14 **September 2, 2011**, as noted in the caption.

15
16
17 DATED this 12th day of August, 2011.

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19 
20 Karen L. Strombom
21 United States Magistrate Judge
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